No. 15,119

United States Court of Appeals

For the Ninth Circuit

RAYMOND PERCIFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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No. 15,119

IN THE

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For the Ninth Circuit

RAYMOND PERCIFIELD,

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vs.

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Appellee.

On Appeal from the United States District Court for the District of Nevada.

BRIEF FOR THE UNITED STATES.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

Having waived indictment, the appellant, Raymond Percifield, was charged by original information filed on April 2, 1955, and by amended information filed August 17, 1955, in the District Court for the District of Nevada, as follows:

Count One—For willful and knowing attempt to evade and defeat income tax owing by him and his wife for the year 1948 by means of filing false and fraudu-

lent income tax returns which understated their income tax in the amount of $2,041.92.

Count Two—For willful and knowing attempt to evade and defeat income tax owing by him for the year 1949 by means of filing a fraududent income tax return which understated his income tax in the amount of $559.76.

A plea of not guilty to these charges was entered, and the matter came on for trial on February 13, 1956, before the Honorable John R. Ross, Judge. On February 21, 1956, the jury found the appellant guilty as charged in both counts of the information. Motion for new trial (R. 11) was filed on February 24, 1956, and was denied after argument on March 12, 1956. (R. 15.)

On March 16, 1956, Judge John R. Ross sentenced the appellant to $5,000 fine and three years imprisonment on Count One. The execution of the imprisonment portion of the sentence was suspended and the appellant was placed on probation for three years. Appellant was fined $5,000 on Count Two and given three years imprisonment, to run concurrently with the imprisonment sentence imposed in Count One, execution thereof being also suspended and appellant being placed on probation for three years.

It was further ordered by Judge Ross that $5,000 of the $10,000 cash bail on deposit with the Clerk be applied on the fine as above imposed and that the appellant be granted five days to apply the additional $5,000, which apparently belonged to W. D. Fortner, to the fine. (R. 16.)

The notice of appeal declares that the appellant has paid the aforesaid fines in full. (R. 20.)

Jurisdiction of the district court was conferred by 18 U.S.C., Sec. 3231, and Rule 18, Federal Rules of Criminal Procedure. This Court has jurisdiction under 28 U.S.C., Sec. 1291. Notice of appeal was filed on March 22, 1956. (R. 21.) No bail was set on appeal.

STATUTE INVOLVED.

Title 26, Int. Rev. Code of 1939, Sec. 145(b).

PENALTIES

* * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

Appellant's brief does not contain a summary of the evidence produced at the trial. For the convenience of the Court, the Government presents the following statement of facts:

During the years 1948 and 1949 the appellant, Raymond Percifield, was the owner and operator of an illegal gambling casino at Rangely, Colorado, known as the Ace-High Club. (R. 196.) The business establishment, which was on the main street of a small town temporarily overpopulated by an oil boom, contained a bar, a lounge, a cafe, and a casino room where it was conclusively established any of the usual games of chance could be played, including blackjack or "21", poker, craps, or dice, as well as slot machines. (R. 118.) Percifield had purchased this club from Joe Rosa in October 1947 (R. 58) for $70,000, including $3,500 worth of inventory (R. 59).

Percifield also owned another gambling casino at Wendover, Nevada, just over the Utah State line (R. 199, 200) and during the years involved he said he supplemented his income from these two gambling casinos by making the "rounds" running games in Colorado, Wyoming, Montana, Nevada and Utah (R. 202).

For the year 1948 two income tax returns were filed by Percifield at Reno, Nevada, one purporting to report income from the Ace-High Club and the other purporting to report his income from the Nevada Club. (Exs. 1, 2, 4.) The return for the Nevada Club showed a net loss of $6,751.37, whereas the return for the Ace-High Club showed a net profit of $335.66. (R. 302.) For the year 1949 Percifield filed an income tax return at Reno, Nevada. (Exs. 3, 5.) This return showed a net loss of $3,923.07. (Ex. 3; R. 277.)

By the testimony of third party witnesses, by various documents, by stipulation, and by the testimony of in-

vestigating agents James Bell and Michael Thomas, evidence was introduced relating to the bank deposits, the net worth at cost basis, and the cash expenditures of the appellant. Testimony of the various witnesses and the content of the documents and stipulations were summarized by the expert witness for the Government, Forrest P. Calkins, Technical Advisor, Office of Regional Counsel, Internal Revenue Service, in Exhibit 34 and in his testimony. (R. 250 *et seq.*) These computations were the subject of little or no controversy at the trial, and no error is assigned in appellant's brief relating to any item appearing thereon. It should be noted that cross-examination developed that the figure for net income per returns filed in 1948, shown as a loss of $7,087.03 was overstated by approximately $670.00. (R. 303.) This error does not affect his computation of corrected net income, however. (R. 302.) For the convenience of the Court, the first two pages of Exhibit 34, that is, without the supporting schedules, are reproduced at pages 1 and 2 of the appendix. The exhibits or testimony in support of each item of the computations is noted in the last column of each schedule.

The Court will note that the great majority of the items making up the two computations are based upon independent third party testimony or records. The testimony of the witnesses J. Leslie Carter (R. 24, R. 66); Clifford C. White (R. 29); Cora Craft (R. 32); E. Joseph Winder (R. 39); Donald Oakley (R. 46); Jennie Rosa (R. 51); Joe Rosa (R. 58); William W. Smith (R. 70); W. D. Fortner (R. 78); and Blake Craft (R. 94) was only in respect to net worth items, bank records or cash expenditures, and will not be further related.

Reference to the income tax returns filed for the year 1948 will immediately disclose that gambling income at the Nevada Club was reported but that no individual gambling income and no gambling receipts at the Ace-High Club are shown. (Exs. 1, 2; R. 138, 141.)

The Government introduced the testimony of Robert J. May (R. 103-106), James L. Lockett (R. 107-110), William B. Beemer (R. 110-112), and William Lehman (R. 117-119) to the effect that gambling games were being operated by Percifield at the Ace-High Club at Rangely, Colorado, during the years 1948 and 1949. One of the appellant's witnesses, William H. Elam, Mayor of the town of Rangely, also so testified. (R. 239-240.)

Edward H. Stroud testified that he sold the appellant a "21" layout, a crap table layout and poker chips with denominations ranging from 50¢ to $25.00 in August and September 1949. These items were consigned to the appellant at Rangely, Colorado, care of the Ace-High Club. (R. 86-93.)

Eleanor Jones testified that she made monthly summary records for the appellant for the Ace-High Club for a portion of the year 1947 and the years 1948 and 1949 (R. 123); that Percifield was to make up and give her a daily record of receipts and that she told him to put down all income, including his gambling income, and to be sure to keep a record of it (R. 123-124); that she got these daily records from the appellant but that he did not put down his gambling income because he didn't want to show it on the monthly summary (R. 124); and that, in any event, she did not know whether he kept any record of his gambling income and she did

not see one. (R. 125.) She identified Exhibit 30 as a monthly check and deposit summary between the dates of January 1948 and December 1949 and stated that she made it up from cancelled checks, check stubs and ledger sheets furnished to her by the appellant. (R. 126.) She also identified Exhibit 31 as her monthly summary of receipts for the Ace-High Club for March to October 1948. (R. 127.)

Mrs. Jones did not prepare either of the 1948 returns but did make a full summary sheet for Mr. Percifield in connection with the Ace-High Club expenses and receipts for his use for this purpose (R. 132.) It contained, she said, no information as to gambling receipts or losses as to the Ace-High Club since he did not give her that information. (R. 124, 125, 132.) The appellant produced this record on cross-examination of Mrs. Jones. (Ex. L, R. 164, 170, 171.) It includes a column for "Police Protection" (R. 172) but contains no column for or information as to gambling receipts of the Ace-High Club (R. 173).

Mrs. Jones did prepare the 1949 return from her summary records for the Ace-High Club and from the Nevada Club records. (R. 132.) She did not keep any records for the Nevada Club but these were given to her by Percifield at the time she prepared the return. (R. 132.)

She said she discussed the 1949 income tax return with Percifield and asked him if he had any other income. He said "No," although he knew she didn't have any record of his gambling receipts either on his individual account or at the Ace-High Club. (R. 134, 135, 138.)

James Bell, special agent for the Internal Revenue Service, testified that he started his investigation on September 22, 1952, of the income tax returns of Percifield for the years 1948, 1949 and 1950. (R. 193, 195.) He interviewed Percifield at the Ace-High Club on September 30, 1952, at which time he elicited from the appellant certain details of his personal history and told him he was investigating his returns for the years 1948 to 1950, inclusive. (R. 193-195.) He then told Percifield that "he had the right, under the Constitution, to refuse to answer any questions, to refuse to supply any information and any information he gave us or any records that he produced might be used against him in any proceeding, criminal or otherwise, which might hereafter be undertaken by the United States. I also informed Mr. Percifield that he had the right to have an attorney present. I asked him if he fully understood and he said he did." (R. 195.)

Percifield told him that his only sources of income were the Nevada Club and the Ace-High Club and that he had received no non-taxable monies during the years 1948 to 1950. (R. 196.) He said he had no cash on hand except the bank roll at the Nevada Club. (R. 196.) He told Bell about various assets, as furniture, jewelry and furs, Buick automobiles, and inventory. (R. 196, 197.)

Percifield then told Bell that he made about a thousand dollars in gambling games during the years 1948 to 1950. (R. 197, 198.) He said he kept no record of this income (R. 198), which was derived from "21", dice and poker games (R. 198). He said his living expenses were approximately $3,000 a year and were paid by cash. (R. 198.)

For the Ace-High Club he said he had his cancelled checks and bank statements and that either he or Mrs. Percifield prepared a daily report which would show the receipts and payouts for the particular date. (R. 198.)

Percifield told Bell he never made payments to local welfare agencies or paid bribes to police officers in return for permission to operate gambling at the Ace-High Club. (R. 199.) Witnesses Donald C. Rider, William Lehman and William H. Elam, however, testified to "donations" to the town of Rangely paid by the Ace-High Club and other gambling clubs (R. 113, 116, 117, 120, 121, 240) and Exhibit "L" shows that money was paid for "police protection" (R. 172).

Percifield said William H. Bacon, Salt Lake City (deceased at time of trial), had prepared his 1948 return and Mrs. Eleanor Jones had prepared his 1949 return from records that he had furnished to Mrs. Jones and the records that she kept for him. (R. 199.)

In the afternoon of the same day Bell showed Percifield the payments that had been made on the Rosa note in 1948 to 1950, inclusive, (Ex. 20) and asked where he got the money to make those payments and pay his living expenses (R. 201). The answer was " 'I told you that I gambled, but I didn't know it was that much.' He said, 'I have taken part in games in Colorado, Wyoming, Montana, Nevada and Utah.' He said, 'I even left this place for two or three weeks at a time, I have taken part in dice, twenty-one, mostly poker games.' . . . I said, 'Now do I understand you took these trips from time to time and stayed away from two to three weeks

at a time?' I asked him, 'Are these gambling trips?' He said, 'No, I wouldn't want to put it down that way. I don't like the sound of it.' " (R. 202.)

Bell then asked Percifield if he would give him an affidavit explaining the source of the apparent omission of about $36,000. Percifield said he wouldn't want to sign any statement without his attorney, and they agreed to meet at his attorney's office the next day. (R. 202.)

Bell asked if the $2,250 a month that he was paying on the Rosa mortgage was gambling income, and Percifield said, "Well, no, some months I would win more than that, but I had agreed to those payments . . ." (R. 203.)

Percifield told Bell that only the bar, cafe and lounge receipts of the Ace-High Club were shown on his daily receipt reports. (R. 203.)

The next day, October 1, 1952, Bell went to the office of Mr. Percifield's attorney, a Mr. Balcome at Meeker, Colorado. Mr. Balcome was the Assistant District Attorney for that district, with offices in the Court House. (R. 204.) Mr. Balcome was advised by Mr. Bell that he desired an affidavit relating to the source of the payments on the Rosa note and living expenses of Percifield (R. 205) and, although at first reluctant, Mr. Balcome dictated an affidavit for Mr. Percifield to sign (R. 206-208). The affidavit was executed and notarized and given to Bell by Balcome. (R. 208.)

During the course of dictating the affidavit, Balcome asked Bell if he could promise, in the event of a trial, that the affidavit would not be used, and was answered in the negative by Bell. (R. 207, 208.)

The affidavit, Exhibit 32, is set out in full at R. 209 and R. 210, but for the convenience of the Court is here reprinted in full in the appendix, page 3.

The next time Mr. Bell saw Mr. Percifield, on January 25, 1953, Percifield refused to answer any further questions. (R. 211, 212.) Bell testified that he received in the way of records from the appellant the check register and monthly summary sheets of expense for the years 1948 and 1949, the original of Exhibit 30 in evidence. (R. 212.) As far as records of income were concerned, however, he received only the monthly summary of cash receipts and payouts for the limited period beginning March of 1948 and ending in October 1948 (R. 212, 213; Ex. 31) and daily report sheets for the period October 1947 to February 25, 1948. Only the daily report sheets for October 1947 referred to gambling income, the remainder did not. (R. 213, 214; Ex. 33.) The agents also had cancelled checks and bank ledger sheets. (R. 223-224.) They were never given the records of the Nevada Club. (R. 215.) They were not given any records showing gambling income other than the daily sheets of the Ace-High Club for October 1947. (R. 216.)

Bell testified that he made an investigation as to loans and nontaxable receipts but found none other than those already in evidence. (R. 216-218.)

Forrest P. Calkins, Technical Advisor, Office of Regional Counsel, Internal Revenue Service, testified at some length relating to his computations of income and tax on two methods—bank deposits and cash expenditures, and net worth and expenditures. (R. 250-294; Exs. 34, 35; Appendix pp. 1 and 2.) He testified that

the appellant's records in evidence were kept on a cash basis and that the returns were on a cash basis except for the use of inventory; that this was a hybrid system and would properly reflect income, if complete, and that the Commissioner would have no right to change the method used; and that he had prepared his computations on the same basis. (R. 251-255.)

In defense appellant put seven witnesses on the stand:

Joyce Proctor, County Superintendent of Schools, Meeker, Colorado, and formerly Principal of the school at Rangely, Colorado, testified that Percifield had a good reputation in the community. She also testified as to general business conditions in the town of Rangely in 1945 to 1949. Although she dropped in to the Ace-High Club on week-ends and after school, she said she never saw any gambling on the premises (R. 182-186);

William W. Smith testified that Percifield had a good reputation in the 1930's (R. 232);

William H. Elam, Mayor of Rangely, Colorado, testified he knew Percifield since 1950 and that he had a good reputation. (R. 238.) He said that gambling was allowed in Rangely, even if illegal, and that he knew there was gambling at the Ace-High Club but that this did not bear on Percifield's reputation as they were donating to the town (R. 239-240);

Hugh L. Caldwell, County Commissioner, Rio Blanco County, Colorado, for 17 years, testified that Percifield had a good reputation; that Rangely was a boom town; and that business dropped off after Percifield bought the Ace-High Club (R. 241, 242);

Robert Fulton, Sheriff of Rio Blanco County, Colorado, from January 14, 1947 to January 13, 1955, testified he visited the Ace-High Club once a week and that Percifield had a good reputation. (R. 247, 248.) He testified that the oil boom in Rangely was over in mid-1948 and that he never saw any gambling at the Ace-High Club although he heard rumors of it (R. 249);

Morris Lange, a building contractor, testified he saw an addition built to the Ace-High Club from across the street while he was building another building. He testified that the whole building had a 20-year life as of 1947 although he had never examined any other parts of the building (R. 188-192);

Charles S. Glenn, manager of the Peraldo Distributing Company, a beverage store, testified as to the existence of an accounts payable at the end of the year 1949 for the Nevada Club (R. 228).

Raymond Percifield, defendant and appellant, did not take the stand.

QUESTIONS PRESENTED IN THIS CASE.

(1) Should alleged errors argued in appellant's brief be considered in view of the failure of his brief to comply with Rule 18(2)(d) of the Rules of the United States Court of Appeals for the Ninth Circuit?

(2) Were the instructions to the jury incomplete and erroneous?

(3) Did the Court err in admitting in evidence the affidavit of appellant? (Ex. 32.)

ARGUMENT.

I. THE ALLEGED ERRORS URGED IN APPELLANT'S BRIEF SHOULD NOT BE CONSIDERED FOR FAILURE TO COMPLY WITH RULE 18 OF THE RULES OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit, effective May 27, 1953, provides in part as follows:

> "1. Counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief, and serve upon counsel for the appellee three copies thereof, within 30 days after the clerk has mailed to him copies of the printed record.
>
> "2. This brief shall contain, in order here stated:
>
> "(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in the instructions refused, together with the grounds of the objections urged at the trial. . . ."

No specification of errors is contained in appellant's brief. The instructions which he complains to have been given erroneously or to have been erroneously refused are not set out in *totidem verbis* anywhere at all in appellant's brief, nor are the objections urged to the trial

court thereto set out anywhere in appellant's brief. The grounds urged at the trial for objection to the admission in evidence of the affidavit (Ex. 32) now alleged improperly admitted into evidence are not set out anywhere in appellant's brief, nor is the full substance of the affidavit set out anywhere in appellant's brief. In the case of *Gordon v. United States* (C. A. 9th, 1953), 202 F. 2d 596, another income tax evasion case, it was held that the errors alleged in a specification of errors section in appellant's brief need not be considered where it failed to set out (1) the instructions requested in *totidem verbis* which were alleged improperly refused; (2) the grounds, if any, of the objections thereto, if any, urged at the trial; (3) the full substance of the evidence alleged improperly admitted or rejected; and (4) the grounds, if any, urged at the trial for the objections thereto, if any.

As authority for the above decision, there is cited in the *Gordon* case at 202 F. 2d 596, 598, the cases of "Ziegler v. United States, 9 Cir., 174 F. 2d 439; Mosca v. United States, 9 Cir., 174 F. 2d 448; DuVerney v. United States, 9 Cir., 181 F. 2d 853; Lii v. United States, 9 Cir., 198 F. 2d 109; Cly v. United States, 9 Cir., 201 F. 2d 806."

It is respectfully submitted that in view of the appellant's complete failure to quote anywhere in his brief the material substance of the basis for his arguments, the Court should not consider the errors alleged by appellant in his brief.

II. INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE CORRECT AND ADEQUATE.

A. The Court's instructions were adequate as to reasonable doubt.

In Section I A of appellant's argument he complains that language used in Instruction No. 12 is confusing, misleading and erroneous. Since this instruction is nowhere set out in full in the appellant's brief, it is set out herein for the convenience of the Court, and reads as follows:

> "A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation." (R. 328, 329.)

No objection or exception was taken to this instruction by the appellant. Therefore, this alleged error should not be considered unless it can be said to be "plain" error under Rule 52(b) of the Federal Rules of Criminal Procedure. *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664. Rules 30 and 52(b) of the Federal Rules of Criminal Procedure read as follows:

> "Rule 30. Instructions
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably di-

rects, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"Rule 52. Harmless Error and Plain Error

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Appellant did not offer any instruction on reasonable doubt.

Appellant complains of isolated phrases in the instruction and fails to read it as a whole and with the other instructions, particularly Nos. 10, 11, 13, 45 and 50.

Appellant seeks to identify Instruction No. 12 with the instruction criticized but held *NOT* prejudicial error in *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, 99 L.ed. 150, but it is clear that the language used in Instruction No. 12 is completely different and more favorable to the appellant than the instruction considered in the *Holland* case. In any event, assuming the two to be identical, the giving of this instruction would not be "plain error" under Rule 52(b), Federal Rules of

Criminal Procedure, when the Supreme Court regards it as an error which was not prejudicial even though proper exception was taken.

As was held in the case of *Bernstein v. United States* (C.A. 5th, 1956), 234 F. 2d 475, 487, it is preferable not to define reasonable doubt, citing *Holland v. United States, supra,* and *Miles v. United States,* 103 U.S. 304, 312, but there is no error where the charge to the jury as a whole conveys the principle of reasonable doubt in criminal case to the jury.

B. Instruction No. 49 on character testimony was adequate.

The appellant complains that the Court's instruction on character testimony was inadequate. Since this instruction was not set out in appellant's brief, it is reprinted herein in *totidem verbis:*

> "You are instructed, that some evidence has been received as to the character of the defendant. You will give to this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it be your duty to find the defendant not guilty." (R. 346, 347.)

No exception was taken to this instruction by the appellant. As a matter of fact, it was offered by the appellant as Appellant's Instruction "A". (R. 6.)

Error alleged by the giving of this instruction will not be considered by the Court of Appeals unless it can be said to be plain error under Rule 52(b), Federal

Rules of Criminal Procedure. *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664.

Appellant argues with respect to this instruction that it was proper as far as it goes but did not include the statement that evidence of good character may in and by itself alone be enough to produce in the minds of the jury reasonable doubt as to the appellant's guilt. It is respectfully submitted that the instruction in essence contained this proposition. No other instruction on character testimony was offered by appellant.

An instruction in all respects similar to this instruction was adjudged sufficient in the case of *Kasper v. United States* (C.A. 9th, 1955), 225 F. 2d 274, 278, another income tax evasion case. See also *Armstrong v. United States* (C.C.A. 9th, 1930), 41 F. 2d 162; *Baugh v. United States* (C.C.A. 9th, 1928), 27 F. 2d 257, *cert. den.* 278 U.S. 639, 49 S.Ct. 34, 73 L.ed. 554.

C. The instructions given by the Court on the net worth method were proper.

Appellant urges error in the failure to give his Instructions "B" and "C" and in the giving of Instructions Nos. 26 and 27. (Appellant's brief, Argument Sections I C, I D and I F.) Since these instructions are not reprinted in full in appellant's brief, they are here set out in full, together with the objections urged before the trial court:

"Instruction B

"You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the

defendant on a given date, followed by proof of a greater net worth on a later date, does not mean that the difference between the two amounts is income." (R. 7.)

* * * * *

"Mr. Puccinelli: May it please the Court, we except to the Court's refusal to give defendant's requested instruction B, as it is a correct statement of the law and is not covered by any other instruction given by the Court." (R. 354.)

"Instruction C

"Ladies and gentlemen of the jury it is my duty to say to you that the conclusion has been reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows: Take all of the assets of the taxpayer on a given date which would include all tangible property, cash on hand or in banks, securities, and accounts receivable from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of

assets and liabilities and deduct the result thereof from the net worth at the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income." (R. 7, 8.)

* * * * *

"We except to the Court's refusal to give defendant's requested Instruction C, as it is a correct statement of the law and is not covered by any other instruction of the Court." (R. 354.)

"No. 26

"The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the methods of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

"The government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has been undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

"If, at the end of a year, a man owns wore [sic] property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by

gift or inheritance or loan, it may be inferred that it was part of taxable income." (R. 336, 337.)

* * * * *

"We except to Instruction No. 26, because it is not a correct statement of the law and is indefinite, confusing and misleading." (R. 356.)

"No. 27

"The government has placed before you evidence relating to the net worth of Raymond and Mossie Percifield at the end of each of the years 1947 to 1949, inclusive. A defendant's net worth for a given year is the difference between his assets and liabilities, and increase in net worth for a year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute a defendant's taxable net income by the net worth method, you should subtract from the increase in net worth for any given year any non-taxable funds received during the year and then add the defendant's non-deductible expenditures for that year which would, of course, include his living expenses and the income taxes paid during the year. These expenditures are added in order to compute net income because they are not represented in the assets which the defend- and [sic] has accumulated during the year and they are nondeductible expenses. If you find that the defendant had an increase in net worth for the years 1948 or 1949, and also had a business or calling of a lucrative nature, there is evidence that the defendant had net income for that year and if the amount exceeds exemptions and deductions, then that income is taxable." (R. 337, 338.)

* * * * *

> "We except to Instruction No. 27, because it is not a correct statement of the law, and is indefinite, uncertain and misleading." (R. 356.)

Appellant's objections were general in nature and insufficient to permit assignment of error in the refusal or giving of these instructions. Rule 30, Federal Rules of Criminal Procedure: *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664; *Eastman v. United States* (C.C.A. 8th, 1946), 153 F. 2d 80, 84.

The first portion of Instruction "C" is not a statement of law, but is rather an argumentative commentary on the evidence and hence was properly refused by the trial court. See *Silkworth v. United States* (C.C.A. 2d, 1926), 10 F. 2d 711, 720, *cert. den.* 271 U.S. 664, 46 S.Ct. 475, 70 L.ed. 1139.

The concluding phrase of the instruction, stating that the increase in net worth "could be income but there may be sources which increase net worth that are not taxable and would not be considered income" is wholly inconclusive and incomplete. The same may be said of Instruction "B". In effect, these two instructions would tell the jury that no inference could be drawn from a net worth increase. As is held in *Holland v. United States,* 348 U.S. 121, 137, 75 S.Ct. 127, 99 L.ed. 150, 165:

> ". . . Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. . . ."

In this respect, appellant argues that he was entitled to an instruction to the effect that increases in net worth standing alone cannot be assumed to be attributable to currently taxable income, citing *Holland v. United States, supra.* He was given such an instruction by No. 23, which reads as follows:

> "The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income." (R. 333, 334.)

See also *Campodonico v. United States* (C.A. 9th, 1955), 222 F. 2d 310, *cert. den.* Oct. 10, 1955, ... U.S. .....

In any event, the Court gave the usual cautionary instructions relating to the presumption of innocence, reasonable doubt, and direct and circumstantial evidence. (Instructions Nos. 10, 11, 12, 13 and 45 reprinted in the appendix hereto.) These instructions and Instructions Nos. 26 and 27 fully covered the substance of Instructions "B" and "C".

With respect to Instructions Nos. 26 and 27, these instructions are substantially the same as instructions given in the cases of *Remmer v. United States* (C.A. 9th, 1953), 205 F. 2d 277, 290, affirmed on further review (1955), 222 F. 2d 720, reversed on other grounds (1956), 350 U.S. 377, ... S.Ct. ....., ... L.ed. ....., and *Legatos v. United States* (C.A. 9th, 1955), 222 F. 2d 678, 685.

While the appellant argues that these instructions were inadequate, it is noted that no adequate instructions were submitted to the trial court by the appellant.

Certainly, Instructions Nos. 26 and 27 are more complete and more accurate than the last sentence of Instruction "C" or than the whole of Instruction "B".

The specific complaint of appellant that he is entitled to an instruction clearly stating that not all increases in net worth constitute taxable income is obviously covered by the last paragraph of Instruction No. 26. Certainly appellant did not submit an instruction clearly setting out this proposition and enumerating what increases in net worth do not constitute taxable income. Further, there was no issue presented to the trial court or to the jury from which it could be found that the appellant was in receipt of more non-taxable receipts than were included in the Government computations.

Appellant complains that the jury should have been instructed that in using the net worth theory they should find beyond a reasonable doubt that an increase in net worth actually occurred and also find beyond a reasonable doubt that the increase was taxable income and, if not, they should acquit the appellant. Appellant submitted no such instruction and ignores the fact that appellant's income was also computed on the bank deposits and cash expenditures method and that the jury did not have to find anything relating to the appellant's net worth if they used this method of determining whether the appellant had unreported income.

D. It was not necessary for the Court to instruct the jury on the definition of inadequate or inaccurate books or records.

In Section I E of the argument in appellant's brief, on page 14, appellant claims it to be substantial error that the Court failed to instruct the jury as to the adequacy of the appellant's books.

No instruction of this nature was offered by appellant, nor was any exception taken in the trial court to a refusal or failure to give such an instruction.

Appellant argues that the jury should have been instructed that it must first find inadequacy or inaccuracy in the taxpayer's books and records as a condition precedent to the use of the net worth method.

Again, no such instruction was offered nor was any exception taken to the refusal or failure to give such instruction.

In any event, such is not the law. *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, 99 L.ed. 150, holds that the Government is not required to show the books of a taxpayer to be inaccurate or inadequate as a prerequisite to the use of the net worth method. It is therein stated that the net worth method is simply circumstantial proof of unreported income and that its use as circumstantial evidence in a criminal case is not intended to be circumscribed by the provisions of the Internal Revenue Code in any respect.

Appellant complains that Government's Instructions Nos. 26 and 30 do not define what constitutes inadequate or inaccurate books and records, but no exception was taken to Instruction No. 26 on this ground and no exception at all was taken to Instruction No. 30. (R. 356.)

No exceptions or objections having been taken in the trial court as to the above, appellee respectfully submits that the matters in this section should not be considered under the decision of *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664, and Rule 30, Federal Rules of Criminal Procedure.

E. There was no plain or substantial error in the instructions given by the Court to the jury.

In Section I G of his brief, appellant simply argues that the errors he claims to have pointed out in Sections I A, B, C, D, E and F of his brief constitute substantial prejudicial and reversible error.

As hereinbefore noted, the errors urged by the appellant should not be considered by the Court of Appeals since there is no compliance in the first section of the brief with Rule 18(2)(d) set out in Section I of appellee's brief, upon the authority of *Gordon v. United States* (C.A. 9th, 1953), 202 F. 2d 596.

Secondly, the alleged errors complained of were not the subject of proper or specific exception to the trial court, as below detailed:

Argument Section of Appellant's Brief	No. of Instruction	Subject	Exception or Objection
I A	12	Reasonable Doubt	None
I B	"A" or 49*	Character Testimony	None*
I C	"C"	Net Worth "Caution"	Correct law; not covered
I D, I F	26	Net Worth Theory	Incorrect law; indefinite, confusing and misleading
I D, I F	27	Net Worth Computation	Incorrect law; indefinite, uncertain and misleading
I F	"B"	Net Worth Increase Not Income	Correct law; not covered
I E	None	Definition of Inadequate Books	None
I E	30	Use of Net Worth and Bank Deposits Methods	None

*This instruction submitted by appellant.

Certainly appellant's brief does not show wherein these instructions constitute plain error and why the clear provisions of Rule 30 of the Federal Rules of Criminal Procedure should not apply. *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664.

Further, appellant fails to consider the general rule that the instructions should all be read together and isolated phrases should not be considered in themselves error.

III. THE COURT PROPERLY ADMITTED IN EVIDENCE EXHIBIT 32—AFFIDAVIT OF APPELLANT.

The second section of the argument in the appellant's brief is devoted to the allegation that an affidavit of the appellant was improperly admitted in evidence.

In this section of the brief, again, appellant has not complied with Rule 18(2)(d) in that he has not set out anywhere in his brief, in the "points urged," in the argument, or anywhere else, the full substance of the evidence admitted and has not quoted the grounds urged at the trial for the objection.

Under the wording of *Gordon v. United States* (C.A. 9th, 1953), 202 F. 2d 596, and the cases therein cited, the Appellate Court need not consider this assignment of error. Should the Court, nevertheless, desire to consider the matters urged by appellant in his brief, the affidavit in question is set out in full in the appendix to this brief, page 3. The grounds urged at the trial for the objection were as follows:

> "Mr. Anderson: We object to this exhibit or affidavit on the following grounds: That there is no evidence of any warning at the time of signing this purported affidavit that it would be used against the defendant in the event of a criminal prosecution, that the witness' evidence shows that it was not given freely and voluntarily, and upon the further ground that the purported document includes income from gambling for 1948, 1949 and 1950, without any segregation as to what the amount was in any year." (R. 208-209.)

The first two grounds urged at the trial court, to-wit, that there was no evidence of any warning of the appellant's constitutional rights at the time the affidavit was signed and that the testimony of Special Agent Bell showed that the affidavit was not given to him freely and voluntarily have apparently been abandoned, for they are not argued in the appellant's brief. This is understandable, for the affidavit was dictated by the appellant's attorney and handed by that attorney to the special agent. (R. 205-208.) In addition, the record shows without contradiction that Percifield was warned of his constitutional rights (R. 195) when first contacted by the investigators, and it cannot be assumed that the appellant's attorney was ignorant of appellant's rights.

In the trial court, as above stated, the objection was urged that the "purported document includes income from gambling for 1948, 1949 and 1950 without any segregation as to what the amount was in any year." This objection would not, of course, go to the admissibility

of the document but rather to its weight. Cf. *Finnegan v. United States* (C.A. 8th, 1953), 204 F. 2d 105. The same can be said of appellant's argument to this effect which attempts to elaborate upon this ground of the objection. The absurdity contained in appellant's argument, it is respectfully submitted, is quite obvious from the following statement at page 17 of appellant's brief:

> "If it is proof of receipt of any taxable income and unreported income for the years 1948 and 1949, how much should be allocated to those years and how much to 1950? Obviously, it could not be used by a trier of fact to support a fact that any given amount of income was received in any specific year. If it cannot support such a fact, it is non-corroborative of any fact to be proved by the Government. It should, therefore, have been excluded."

Of course the affidavit was admissible. It does not, it is true, relate to a specific amount of omitted gambling receipts in each of the years 1948 and 1949, but it is an admission that the appellant did have gambling receipts which he did not report on his returns for those two years.

The appellant argues that the affidavit of the appellant (Ex. 32) cannot be said to be corroborated by any competent evidence to support the same (appellant's brief, p. 18). Reference to the statement of facts, which were not in any manner or form brought to the attention of the trial court by the appellant's brief, will readily disclose the existence of an overabundance of corroborating evidence which stands completely uncontradicted in the record.

There was evidence that the appellant was running an illegal gambling casino at Rangely, Colorado. The town was wide open and so were appellant's gambling facilities. There was the testimony of Eleanor Jones, who kept his summary records for the Ace-High Club, to the effect that she told the appellant to put down his gambling income on his daily reports; that he failed to do so, and that the receipts on the return of the Ace-High Club did not include the appellant's gambling receipts, even though his expenses did include payoffs for police protection for this lucrative activity.

Certainly the affidavit is corroborated by the independent testimony of disinterested third party witnesses as to the net worth assets and liabilities of the appellant and as to the bank deposits greatly in excess of reported gross receipts, and by the very returns themselves, which show no net income but net losses, while the appellant waxed fat and prosperous.

It is also argued by appellant that the Government has not established *corpus delicti* in this case independent of the admissions of the appellant. It is indeed hard to conceive how *corpus delicti* could be more well established than it was in this case. By independent third party testimony, the Court and the jury were presented the picture of a gambler who deliberately failed to report his individual gambling receipts and his gambling receipts from the operation of an illegal casino. They were shown how his assets increased and how his liabilities decreased during these two years. They were shown how his bank deposits at Rangely, Colorado, were heavy and greatly exceeded the gross receipts shown in

his summary records for the Ace-High Club. They were shown how he himself banked and ran the gambling games at the Ace-High Club. They were finally shown that when it came to income tax time the gambling receipts were omitted from the income tax return.

The appellant also alleges that the evidence shows that the appellant reported his gambling income on his tax returns and that there was no evidence that the gambling income as reported was incorrect except for the affidavit. It is submitted that the testimony of Eleanor Jones, the appellant's bookkeeper, clearly and convincingly shows that the appellant did not report his gambling income from the Ace-High Club. It is true that he did report some gambling income from the Nevada Club. However, that there was gambling income from the Ace-High Club is beyond question when there is considered the testimony of Edward A. Stroud (R. 86-94); Robert J. May (R. 103-106; James L. Lockett (R. 107-110); William B. Beemer (R. 110-112); William Lehman (R. 117-121); Bert Taylor (R. 174-182); William H. Elam (R. 238-240); and Robert Fulton (R. 247-249). From their testimony and from that of Eleanor Jones to the effect that appellant made no record of his gambling income, and that when they discussed the 1949 return he told her that he had no income other than that on the records, it is clear that the Ace-High gambling receipts were not reported. There was, therefore, ample independent evidence of source of unreported income and of intent not to report it.

As to the amount of the unreported income, independent testimony, documents and stipulations furnished the

primary basis for computations of corrected income far in excess of that reported on the income tax returns. To illustrate this fact, computations of income by the bank deposits and cash expenditures method and by the net worth method are included in the appendix, pages 1 and 2. These schedules are the same as the first two pages of Exhibit 34, put in evidence through the testimony of Forrest Calkins, the Government expert witness, except that there has been added thereto a column referring to the testimony and exhibits in evidence whence each item on the two schedules was derived. Income so proven compared with income reported on the return is as follows:

Year	Income per Returns	INCOME CORRECTED	
		Bank Deposit Method	Net Worth Method
1948 (Loss)	($ 6,415.71)	$14,095.54	$14,502.78
1949 (Loss)	(3,923.07)	7,975.23	6,550.24
Totals (Loss)	($10,338.78)	$22,070.77	$21,053.02

Proof of unreported income by these methods, proof of a likely source of the unreported income, and proof of the intent of appellant are sufficient to establish the crime of income tax evasion without more. Certainly it is sufficient to establish the *corpus delicti* and the required corroboration of appellant's affidavit.

Davena v. United States (C.A. 9th, 1952), 198 F. 2d 230, *cert. den.* (1952), 344 U.S. 878, 73 S.Ct. 168, 97 L.ed. 680;

Campodonico v. United States (C.A. 9th, 1955), 222 F. 2d 310, *cert. den.* ..... U.S. ....., ... S.Ct. ....., ... L.ed. ..... (Nov. 10, 1955);

Smith v. United States (1954), 348 U.S. 147, 75 S.Ct. 194, 99 L.ed. 192;

United States v. Calderon (1954), 348 U.S. 160, 75 S.Ct. 186, 99 L.ed. 202.

IV. SUMMARY.

In summary of appellee's argument, it is respectfully submitted:

1. That appellant's brief is wholly incomplete and inaccurate and should not be considered under Rule 18 of the Court of Appeals for the Ninth Circuit;

2. That there was no error in the giving or refusal to give the instructions as alleged in appellant's brief; that in any event, there is no plain error under Rule 52(b) to take this case out of the operation of Rule 30 of the Federal Rules of Criminal Procedure; and

3. That the affidavit of the appellant was fully corroborated and wholly admissible in evidence, and that the *corpus delicti* of the crime was fully shown.

CONCLUSION.

For the reasons heretofore stated, it is respectfully submitted that the judgment and sentence of the District Court should be affirmed.

Dated, San Francisco, California,
November 28, 1956.

Respectfully submitted,

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Attorneys for Appellee.

No. 15,119

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND PERCIFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Nevada.

MOTION TO ASSESS ENTIRE COST OF PRINTING RECORD AGAINST APPELLANT.

Comes now the United States and moves the Court to assess the costs of printing the record designated by the appellee and not designated by appellant against the appellant on the following grounds:

1. That appellant's statement of points on appeal include in paragraphs 2 and 3 thereof the statement that appellant intends to rely upon question of the sufficiency of the evidence, thereby requiring the Government to designate the entire record not designated by the appellant in order to meet such proposed argument (R. 361);

2. That appellant argues in Part II of the argument in his brief that the *corpus delicti* was not sufficiently established to permit the introduction of the affidavit of the appellant (Ex. 32) in evidence, and that said affidavit was not sufficiently corroborated, thereby making it incumbent upon the Government to designate the entire record in this case so that this Honorable Court could make a determination of these matters, including, but not limited to, the testimony of the following witnesses:

J. Leslie Carter	(R. 24)
Clifford C. White	(R. 29)
Cora Craft	(R. 32)
E. Joseph Winder	(R. 39)
Donald Oakley	(R. 46)
Jennie Rosa	(R. 51)
Joe Rosa	(R. 58)
William W. Smith	(R. 70)
W. D. Fortner	(R. 78)
Edward A. Stroud	(R. 86)
Blake Craft	(R. 94)
Robert J. May	(R. 103)
James L. Lockett	(R. 107)
William B. Beemer	(R. 110)
Donald C. Rider	(R. 112)
William Lehman	(R. 117)
Bert Taylor	(R. 174)
William H. Elam	(R. 328)

ARGUMENT IN SUPPORT OF MOTION TO ASSESS COST OF PRINTING RECORD AGAINST APPELLANT.

The appellant designated only a minor portion of the testimony of certain witnesses as the record on appeal and yet in the points relied upon on appeal stated that he would question the sufficiency of the evidence to sustain the verdict. (R. 361). Of course, in order to argue the sufficiency of the evidence, the Government was forced to designate the balance of the record. The Government could not and did not know that appellant would not question the sufficiency of the evidence as such in his brief.

While not questioning the sufficiency of the evidence adduced below as such in his brief, appellant does allege in Section II of the argument that the affidavit of the appellant (Ex. 32) was improperly admitted because it was not corroborated by independent testimony and because the *corpus delicti* had not been established by the Government. This, it is respectfully submitted, does require a reading of the entire record by the Court to determine the existence or nonexistence of these factors. For example, the appellant did not designate the testimony of various witnesses relating to the fact that there was gambling at the Ace-High Club, coupled with Mrs. Jones' testimony that the appellant reported no gambling income from the Ace-High Club or from his own individual gambling ventures. The testimony of these witnesses becomes very material to the establishment of the *corpus delicti,* corroboration of the affidavit in question and to the establishment of source of income, all of which the appellant in Section II of his brief states were not shown.

CONCLUSION.

It is respectfully submitted that the cost of printing the entire record on appeal should be assessed against the appellant, regardless of the decision of the Court on the merits.

Dated, San Francisco, California,
November 28, 1956.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

1. Receipts per Bank Record
   A. First State Bank of R
   B. Cash Not Deposited—; Ex. 34, Sched. A; R. 261-2
   C. Nevada Bank of Comm; Ex. 34, Sched. I, J.

   Total Receipts pe

2. Cash Expenditures—Not o
   Schedules I, J 11, 13, 16, 19, 20, 29, 30;
   hed. I, J; R. 42, 265, 198

3 Less: Non-Taxable Receip
   A. Loan from R. W. Jack, 12
   B. Loan from Nevada Ba; R. 27, 67, 68
   C. Loan from Clifford W 30
   D. Loan from Cora Craft 33, 34
   E. Loan from W. D. For 79-82
   F. Repayment for purcha
      Craft 96

4. Gross Income .....
5. Less: Allowable Deduction
   A. Interest paid—Clifford
   B. Interest paid—Joe Ros x. 34, Sched. B
   C. Interest paid—W. D. F
   D. Interest paid—Nevada 2; R. 68
   E. Bank Withdrawals
      1. First State Bank of ; Ex. 34, Sched. E, F
      2. Nevada Bank of Co 0; Ex. 34, Sched. G
   F. Cash Not Deposited—S 9; Ex. 34, Sched. A; R. 262-3
   G. Non-Cash Outlay Expe
      1. Inventory Decrease 3; Ex. 34, Sched. K; R. 197, 281
      2. Depreciation—Acc 3; R. 275
         Neva
   H. Total Deductions for A
6. Ajusted Gross Income ....
7. Less: Standard Deduction

8. Net Income .....
9. Net Income per returns file 3

10. Understatement of Net Inc

COMPUTATION OF NET INCOME
BANK DEPOSIT AND EXPENDITURE METHOD
YEARS 1948, 1949

	1948	1949	
1. Receipts per Bank Records			
A. First State Bank of Rangely—Deposits	$ 99,359.39	$18,871.44	Exs. 7, 8, 9
B. Cash Not Deposited—Schedule A	7,403.03	2,330.72	Exs. 7, 8, 9; Ex. 34, Sched. A; R. 261-2
C. Nevada Bank of Commerce	21,681.86	614.38	Exs. 13, 15; Ex. 34, Sched. I, J.
Total Receipts per Bank Records	$128,444.28	$21,816.54	
2. Cash Expenditures—Not on Bank Records—Schedules I, J	8,250.00	7,299.55	Exs. 7, 10, 11, 13, 16, 19, 20, 29, 30; Ex. 34, Sched. I, J; R. 42, 265, 198
	$136,694.28	$29,116.09	
3 Less: Non-Taxable Receipts			
A. Loan from R. W. Jackson	$ 3,500.00		Exs. 10, 11, 12
B. Loan from Nevada Bank of Commerce	2,000.00		Exs. 16, 22; R. 27, 67, 68
C. Loan from Clifford White	2,500.00		Ex. 17; R. 30
D. Loan from Cora Craft	3,500.00		Ex. 18; R. 33, 34
E. Loan from W. D. Fortner	1,000.00		Ex. 25; R. 79-82
F. Repayment for purchase of auto for Blake Craft	2,800.00		Ex. 13; R. 96
	$ 15,300.00	.....	
4. Gross Income	$121,394.28	$29,116.09	
5. Less: Allowable Deductions—Cash Outlay			
A. Interest paid—Clifford White		75.00	R. 30
B. Interest paid—Joe Rosa, Schedule B	$ 2,717.53	607.20	Ex. 20; Ex. 34, Sched. B
C. Interest paid—W. D. Fortner	44.00		Exs. 25, 30
D. Interest paid—Nevada Bank of Commerce	78.84	27.33	Exs. 16, 22; R. 68
E. Bank Withdrawals			
1. First State Bank of Rangely, Sch. E, F	70,555.72	11,779.81	Exs. 8, 30; Ex. 34, Sched. E, F
2. Nevada Bank of Commerce, Sch. O	19,205.50	700.71	Exs. 15, 30; Ex. 34, Sched. G
F. Cash Not Deposited—Schedule A	7,403.03	2,330.72	Exs. 7, 8, 9; Ex. 34, Sched. A; R. 262-3
G. Non-Cash Outlay Expenses			
1. Inventory Decrease Sch. K	375.00		Exs. 1, 2, 3; Ex. 34, Sched. K; R. 197, 281
2. Depreciation—Ace Hi Club	4,394.50	3,100.00	Exs. 1, 2, 3; R. 275
Nevada Club	1,524.62	1,633.95	
H. Total Deductions for Adjusted Gross Income	$106,298.74	$20,254.72	
6. Ajusted Gross Income	15,095.54	8,861.37	
7. Less: Standard Deduction	1,000.00	886.14	
8. Net Income	$ 14,095.54	$ 7,975.23	
9. Net Income per returns filed	(7,087.03)	(3,923.07)	Exs. 1, 2, 3
10. Understatement of Net Income	$ 21,182.57	$11,898.30	

COMPUTATION OF NET INCOME

NET WORTH METHOD

	1/1/48	12/31/48	12/31/49	
1. Assets				
A. Cash on Hand	$ 5,000.00	$ 5,000.00	$ 5,000.00	R. 200, 196
B. Bank Accounts Schedules E & F				
1. First State Bank of Rangley	1,660.12	1,729.79	(178.58)	Exs. 7, 8, 9; Ex. 34, Sched. E, F
2. Nevada Bank of Commerce	406.57	86.33	.....	Exs. 13, 15
3. Stockmens Bank	86.15	86.15	86.15	Ex. 23; R. 72
4. Stockmens Bank	63.11	63.11	63.11	Ex. 24; R. 73, 74
C. Inventory—Nevada Club	1,200.00	750.00	750.00	Exs. 1, 2, 3; Ex. 34, Sched. K
Ace Hi Club	1,200.00	1,275.00	1,275.00	Exs. 1, 2, 3; R. 197, 281 Ex. 34, Sched. K
D. Frame Building—Nevada Club	5,000.00	5,000.00	5,000.00	Exs. 1, 2, 3; R. 281
E. Equipment—Nevada Club	2,500.00	2,500.00	2,500.00	Exs. 1, 2, 3; R. 281
F. Light Plant—Nevada Club	2,951.86	2,951.86	2,951.86	Exs. 1, 2, 3; R. 281
G. Ace Hi Club	66,500.00	66,500.00	66,500.00	R. 59, 281
H. Gambling Equipment—Ace Hi Club			511.30	Exs. 26, 27; R. 92-93, 281-2
I. Household Furniture	500.00	500.00	500.00	R. 196
J. Jewelry	150.00	150.00	150.00	R. 196
K. Automobile	2,400.00	2,400.00	3,461.87	Ex. 19; R. 197
L. Total Assets	$89,617.81	$88,992.24	$88,570.71	
2. Liabilities				
A. Loans and Notes Payable				
1. Joe Rosa	$49,500.00	$27,452.53	$20,559.73	Ex. 20
2. William Bacon	6,500.00	1,000.00	1,000.00	Exs. 10, 11, 12; Ex. 34, Sched. M
3. R. W. Jackson	4,000.00	7,500.00	5,500.00	Exs. 10, 11, 12; Ex. 34, Sched. N
4. W. D. Fortner	2,000.00	1,700.00	1,140.00	Ex. 25
5. Nevada Bank of Commerce	2,000.00	1,000.00	.....	Ex. 16
6. Clifford White		2,500.00	2,500.00	Ex. 17; R. 30
7. Cora Craft		3,500.00	3,500.00	Ex. 18; R. 34
8. Chattel Mortgage—G.M.A.C.			2,249.47	Ex. 19; R. 47
B. Liabilities—Total	$64,000.00	$44,652.53	$36,449.20	
3. Net Worth	$25,617.81	$44,339.71	$52,121.51	
A. Less: Beginning Net Worth		25,617.81	44,339.71	
B. Increase in Net Worth		$18,721.90	$ 7,781.80	
C. Less: Proceeds from Cattle Sales		300.00	560.00	R. 81, 82, 287
Depreciation — Ace Hi Club		4,394.50	3,100.00	Exs. 1, 2, 3; R. 287
Nevada Club		1,524.62	1,633.95	Exs. 1, 2, 3; R. 287
		$ 6,219.12	$ 5,293.95	
		$12,502.78	$ 2,487.85	
D. Add: Non-Deductible Expenses				
1. Living Expenses		$ 3,000.00	$ 3,000.00	R. 198, 288
2. Loss on Trade-in on Buick Sch. L			1,790.20	Ex. 19; R. 288; Ex. 34, Sched. L
E. Adjusted Gross Income		$15,502.78	$ 7,278.05	
Less: Standard Deductions		1,000.00	727.81	
4. Net Income		$14,502.78	$ 6,550.24	
A. Net Income per Return		(7,087.03)	(3,923.07)	Exs. 1, 2, 3

PLAINTIFF'S EXHIBIT No. 32

Affidavit

State of Colorado,
County of Rio Blanco—ss.

Raymond S. Percifield, being first duly sworn, on oath, depose and says:

1. That he is Raymond S. Percifield, the owner and operator of the Ace-High Bar and Cafe in Rangely, Colorado, and is a resident of Rio Blanco County, Colorado.

2. That during the calendar years 1948, 1949 and 1950 he neglected to show all income on income tax returns, form 1040, and attached schedules thereto, and that during those years he received personal income in excess of $36,000.00, part of which additional income is reflected by payments on one certain promissory note given by this affiant as part of the purchase price of the Ace-High Bar and Cafe.

3. That the additional income which was not reported during those three years was obtained from gambling in the States of Colorado, Utah, Wyoming, Montana and Nevada.

4. That this affiant failed to report income received from gambling enterprises during the above years, through ignorance of the requirements of the Internal Revenue Code in that connection, and he is willing at this time to pay all taxes and penalties properly assessable against him in that connection, and states that at no time did he intend to violate any of the provisions of the Internal Revenue Code or defraud the United States Government.

5. That this affidavit is given voluntarily at the request of James W. Bell, Acting Special Agent, United States Treasury Department, and Michael E. Thomas, Internal Revenue Agent, United States Treasury Department.

6. Further Affiant sayeth not.

Witness my hand and seal this 1st day of October, A.D. 1952.

RAYMOND S. PERCIFIELD.

Subscribed and sworn to before me this 1st day of October, A.D. 1952, by Raymond S. Percifield.
[Seal]

ROBERT D. WHITE,
Notary Public.

My commission expires June 4, 1955.

"No. 10

"You are instructed that the defendant is presumed to be innocent and that the presumption of innocence attends him to the end of the trial, or until the verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt." (R. 328.)

"No. 11

"You are instructed that the rule of law which throws around the defendant the presumption of innocense [sic] and requires the government to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime." (R. 328.)

"No. 12

"A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation." (R. 328-329.)

"No. 13

"You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt, as the same has been defined to you, without it being restated or repeated. You are to understand that the requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you." (R. 329.)

"No. 45

"Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness tsetifies [sic] directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which this jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence.

"In the case of circumstantial evidence it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in

this case, as to either count, are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that count. All that can be required is not absolute and positive proof, but such proof as convinces the jury that the crime has been made out against the accused beyond a reasonable doubt." (R. 344-345.)